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No. 82-629

In The

Supreme Court of the United States

October Term, 1983

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION,
Petitioner,

vs.

WOLD ENGINEERING, P. C., A NORTH DAKOTA PROFESSIONAL CORPORATION,
Respondent,

vs.

SCHMIDT, SMITH & RUSH,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 28, 1982
CERTIORARI GRANTED APRIL 25, 1983

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	Date Filed
1. Summons and Complaint	April 7, 1980
2. Answer and Counterclaim	May 21, 1980
3. Answer to Defendant's Counterclaim	May 22, 1980
4. Note of Issue to the Court	May 22, 1980
5. Third Party Summons and Complaint	May 28, 1980
6. Separate Answer of Third Party Defendant Acton Construction, Co.	June 12, 1980
7. Answer of Third Party Defendant Schmidt, et al	Aug. 14, 1980
8. Motion to Dismiss, Motion for Summary Judgment by Third Party Defendant Acton Construction, Co.	Sept. 17, 1980
9. Order Dismissing Third Party Complaint	Oct. 1, 1981
10. Motion of Defendant to Dismiss for Lack of Jurisdiction	Jan. 12, 1982
11. Memorandum Opinion Granting Motion to Dismiss	Jan. 12, 1982
12. Judgment of Dismissal	Jan. 18, 1982
13. Notice of Entry of Judgment	Jan. 19, 1982
14. Notice of Appeal	Feb. 23, 1982
15. North Dakota Supreme Court's Decision Affirming Judgment of Dismissal	July 1, 1982
16. Filing of Petition for Certiorari	Sept. 28, 1982
17. Solicitor Invited to File Brief	Nov. 29, 1982
18. Petition for a Writ of Certiorari Granted	April 25, 1983

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JOINT APPENDIX

IN DISTRICT COURT

NORTHWEST JUDICIAL DISTRICT

STATE OF NORTH DAKOTA
COUNTY OF WARD

Three Affiliated Tribes of the Fort Berthold Reservation,

Plaintiff,

vs.

Wold Engineering, P.C., a North Dakota Professional Corp.,

Defendant.

COMPLAINT

Case #

JURISDICTION

I.

Defendant is a Professional Corporation doing business within the State of North Dakota and organized under the Laws of the State of North Dakota.

———o———

STATEMENT OF CASE

II.

That the Plaintiff contracted with Defendant to provide Plaintiff with expert Engineering services for the construction of a year around water intake facility from Lake Sakakawea for the 4-Bears Village.

III.

That the water intake system designed by Defendant is not fit nor functional for the purposes and location intended.

IV.

That Defendant was negligent and incompetent in the designing of a year round water intake system.

V.

That because of Defendant's negligence and faulty design the water intake system has frozen up and has not functioned for each of the first three winters of its exist-

ence, namely the winters of 1977-1978, 1978-1979, and 1079 (sic) -1980.

VI.

That because of the freezing up of the water intake system Plaintiff's (sic) have been without water for considerable lengths of time and with raw unhealthy water supplies for the combined winter months of 1977-1978, 1978-1979, and 1979-1980.

VII.

That to convert the water intake system to a year around facility would cost $350,000.00.

VIII.

That Plaintiffs have paid the sum of $75,000.00 to rehabilitate the system to keep it functioning.

WHEREFORE, PLAINTIFF PRAYS THIS COURT TO GRANT:

1. This Court to grant a judgment against Defendant in the sum of $425,000.00 together with costs, disbursements and reasonable attorneys fees.

Dated this 20th day of March, 1980.

JOHN O. HOLM
Attorney for Plaintiff
17 Second Ave. West
Dickinson, North Dakota 58601

.....

John O. Holm

Civil No. ——

IN DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT

STATE OF NORTH DAKOTA
COUNTY OF WARD ss

Three Affiliated Tribes of
the Fort Berthold Reservation,

Plaintiff,

vs.

Wold Engineering, P. C., a
North Dakota Professional Corp.,

Defendant.

ANSWER AND COUNTERCLAIM

NOW COMES the Defendant Wold Engineering, P. C., and for its answer to the Plaintiff's Complaint, alleges:

1.

That the Complaint fails to state a claim against this Defendant upon which relief can be granted.

2.

Except as hereinafter admitted, modified, qualified or explained, this answering Defendant, Wold Engineering, P. C., denies all of the allegations of the Complaint.

3.

Admit Paragraphs I and II of the Complaint.

4.

Deny Paragraphs III, IV, V and VI of the Complaint.

5.

Deny that this answering Defendant has knowledge or information sufficient to form a belief as to the truth of Paragraph VII of the Complaint, and therefore denies the same; alleges that such allegation is a conclusion on the part of the pleader, is not germane to and is without and beyond the gravamen of the complaint; is not a valid and proper measure of damage with respect to the alleged cause of action set forth in the Complaint.

6.

With respect to Paragraph VIII of the Complaint, these Defendants deny that they have knowledge or belief sufficient to form a belief as to the truth of the same, and therefore deny the same; further allege that if the said Plaintiffs have expended any sum as alleged in said paragraph for such rehabilitation, any and all events which caused or required such rehabilitation were not caused by any act or omission on the part of this Defendant, but were caused by others over whom this Defendant had and has no control; that the Plaintiff wholly failed to guard against any acts of others which may have caused, or led to, any damage to any of said installation; that the Plaintiff wholly failed in any manner whatsoever to take adequate and sufficient steps and precautions to protect the installation, and any damage to such installation caused by the acts of others were due proximately to the carelessness and negligence of the Plaintiffs in failing to protect such installation.

7.

Further answering, this Defendant specifically denies that this answering Defendant was in any way, either by commission or omission, negligent with respect to any design work which this Defendant did with respect to the structure described in the Complaint; that the plans and specifications as prepared by this Defendant were in all things proper and correct for the scope of the project to be undertaken according to the instructions of the Plaintiff and the design of this answering Defendant was in no manner whatsoever defective. Further, this answering Defendant alleges that the damages complained of by the Plaintiff, if in fact sustained by the Plaintiff, were caused by acts or omissions of others over whom this Defendant had no authority or control, and were caused by the wilful carelessness and negligence on the part of the Plaintiff in protecting the completed installation.

COUNTERCLAIM

FURTHER ANSWERING, and as and (sic) for a counterclaim against the Plaintiff, this Defendant alleges that the Plaintiff owes to the Defendant the sum of Four Thousand Five Hundred Dollars ($4,500.00) as the balance due on the engineering fees due this Defendant from the Plaintiff with respect to the engineering services performed by this Defendant in connection with the construction of the structure set forth in the Plaintiff's Complaint, no part of which balance due has been paid to this Defendant, even though these Defendants have demanded the same from the Plaintiff who refused to pay.

WHEREFORE, this answering Defendant prays the Court that the Plaintiff take nothing in the above entitled action and that the Plaintiff's action be dismissed; that this answering Defendant have judgment against the Plaintiff in the sum of Four Thousand Five Hundred Dollars ($4,500.00) as prayed for in this Defendant's Counterclaim, together with interest thereon, and that this answering Defendant have its costs and disbursements, and such other relief as to the Court may seem just.

Dated at Minot, North Dakota, this 15th day of May, 1980.

BOSARD, McCUTCHEON, HOLUM & RAU, LTD.
Attorneys for Defendant
200 Heritage Place
P. O. Box 939
Minot, North Dakota 58701

BY: /s/ Hugh McCutcheon

IN DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT

STATE OF NORTH DAKOTA
COUNTY OF WARD

Three Affiliated Tribes of
the Fort Berthold Reservation,

Plaintiff,

vs.

Wold Engineering, P. C., a
North Dakota Professional Corp.,

Defendant.

ANSWER TO DEFENDANT'S COUNTERCLAIM

NOW COMES the above-named Plaintiff and for their ANSWER to Defendant's Counterclaim and states it denies each and every allegation contained in the Defendant's Counterclaim.

WHEREFORE, Plaintiff prays that Defendant's Counterclaim be dismissed with prejudice and costs and attorneys fees for Plaintiff and any other relief the Court deems necessary and just.

Dated this 21st day of May, 1980, Dickinson, North Dakota.

/s/ John O. Holm
Attorney for Plaintiff
17 2nd Ave W.
Dickinson, N. D. 58601

Civil No. 46392

IN DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT

STATE OF NORTH DAKOTA
COUNTY OF WARD ss

Three Affiliated Tribes of
the Fort Berthold Reservation,

Plaintiff,

vs.

Wold Engineering, P. C.,
a North Dakota Professional Corporation,

Defendant and Third-Party Plaintiff,

vs.

Schmidt, Smith & Rush and Acton Construction Co., Inc.,

Third-Party Defendants.

THIRD-PARTY COMPLAINT

The above named Defendant and Third-Party Plaintiff, by its attorneys, as and for a Third-Party Complaint against the Third-Party Defendants, alleges:

I.

Plaintiff, Three Affiliated Tribes of the Fort Berthold Reservation, has filed against the Defendant, Wold Engineering, P. C., a North Dakota Professional Corporation, a Complaint, a copy of which is attached hereto as Exhibit "A".

II.

As appears from the Complaint, the Plaintiff alleges that the Plaintiff contracted with the Defendant to pro-

vide Plaintiff with expert engineering services for the construction of a year round water intake facility from Lake Sakakawea for the Four Bears Village; that the water intake system desig ·ed by the Defendant is not fit nor functional for the purposes and location intended; that Defendant was negligent and incompetent in the designing of a year round water intake system; that the system has frozen up and not functioned for each of the first three winters of its existence, namely the winters of 1977-1978, 1978-1979, and 1079 (sic) -1980. It is further alleged in said Complaint that by virtue of freezing up of the water intake system the Plaintiff has been without water for a considerable length of time, and with raw, unhealthy water supplies for the winter months of 1977 through 1980. It is further alleged in said Complaint that Plaintiff has paid the sum of Seventy-five Thousand Dollars ($75,000.00) to rehabilitate the system to keep it functioning, and that to convert the water intake system to a year round facility would cost Three Hundred Fifty Thousand Dollars ($350,-000.00).

The Defendant and Third-Party Plaintiff has, among other things, denied the allegations of the Plaintiff's Complaint.

III.

That the Defendan'. Schmidt, Smith & Rush, was employed by the Defendant, Wold Engineering, P. C., for the purpose of preparing design, plans and specifications for all of the electrical and heating work required with respect to the project described in the Complaint, which design was intended to keep said water intake system from freezing during winter months; that it was the duty of the

said Third-Party Defendant, Schmidt, Smith & Rush, to use due care in its design of the electrical and heating system, and to specify good and proper equipment for the ordinary purposes for which such equipment was intended, and that such duty ran to the Third-Party Plaintiff and to any and all other parties who would use and rely upon the design and equipment so specified. That this Defendant and Third-Party Plaintiff followed and relied upon the skill of the said Third-Party Defendant, Schmidt, Smith & Rush, in said design and equipment specifications, and that the Third-Party Defendant, Schmidt, Smith & Rush, breached its duty to this Defendant and Third-Party Plaintiff in that the said Third-Party Defendant, Schmidt, Smith & Rush, was careless and negligent in that the design and specifications which it provided to the Third-Party Plaintiff were insufficient and defective and did not meet the purpose for which such design was intended.

IV.

That the Third-Party Defendant, Acton Construction Co., Inc., entered into a contract with the Plaintiff to furnish all of the materials, supplies, machinery, equipment, tools, superintendence, labor, and other accessories and services necessary to complete the said project referred to in the Complaint in accordance with the conditions and prices stated in the Proposal, the General Conditions, Supplemental General Conditions and Special Conditions of the Contract, including all maps, plats, blueprints and other drawings and printed or written explanatory matter thereof, all of which were made part of the contract; that the said Third-Party Defendant, Acton Con-

struction Co., Inc., wholly failed to keep said project in repair as required by the contract and within the time therein provided; that if any materials in said project were defective, the same were supplied by the said Third-Party Defendant, Acton Construction Co., Inc., and for which said contractor is liable to the Plaintiff; that the said contractor in attempting to repair work performed by the contractor negligently delayed the performance thereof, and that such negligent delay was a proximate cause of the damage sustained by the Plaintiff; that the said Third-Party Defendant, Acton Construction Co., Inc., or its subcontractors, failed to comply in all things with the contract provisions, the plans and specifications, general conditions and special conditions and that such contractor furnished faulty equipment and defective workmanship in the performance of its contract.

V.

In the event that the Plaintiff should recover any damage from the Defendant and Third-Party Plaintiff for damages as alleged in the Complaint, then the Defendant and Third-Party Plaintiff is entitled to full indemnity and/or contribution from the said Third-Party Defendants.

WHEREFORE, Wold Engineering, P. C., Defendant and Third-Party Plaintiff, demands judgment against the Third-Party Defendants for all sums by way of indemnity and/or contribution that may be adjudged against it in favor of the Plaintiff, together with costs and disbursements herein and such other and further relief as the Court may deem just and equitable.

Dated at Minot, North Dakota, this 20th day of May, 1980.

BOSARD, McCUTCHEON, HOLUM & RAU, LTD.

Attorneys for Defendant and Third-Party Plaintiff, Wold Engineering, P. C.
200 Heritage Place
P. O. Box 939
Minot, North Dakota 58701

By: /s/ Hugh McCutcheon

Civil No. 46392

IN DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT

STATE OF NORTH DAKOTA
COUNTY OF WARD ss

Three Affiliated Tribes of
the Fort Berthold Reservation,

Plaintiff,

vs.

Wold Engineering, P. C., a North Dakota
Professional Corporation,

Defendant and Third-Party Plaintiff,

vs.

Schmidt, Smith & Rush and Acton Construction Co., Inc.,

Third-Party Defendants.

ANSWER OF THIRD-PARTY DEFENDANT
SCHMIDT, SMITH & RUSH

I.

Schmidt, Smith & Rush, Inc. denies all the allegations of the Complaint and of the Third-Party Complaint, except as herein expressly admitted, qualified or explained.

II.

Responding to paragraph 3 of the Third-Party Complaint, Schmidt, Smith & Rush admits that it was employed by the Defendant, Wold Engineering, P. C. for the purpose of designing and preparing plans and specifications

for electrical and heating work required with respect to the project described in the complaint.

III.

Schmidt, Smith & Rush denies that it was careless and negligent and denies that its design and specifications were insufficient and defective.

DATED at Minot, North Dakota, this 12th day of August, 1980.

PRINGLE & HERIGSTAD, P. C.
/s/ Jan M. Sebby
Attorney for the Third-Party Defendants
Box 1000
Minot, ND 58701

Civil No. 46392

IN DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT

STATE OF NORTH DAKOTA
COUNTY OF WARD

Three Affiliated Tribes of the
Fort Berthold Reservation,

Plaintiff,

vs.

Wold Engineering, P. C., A North Dakota
Professional Corporation,

Defendant and Third-Party Plaintiff,

vs.

Schmidt, Smith & Rush and Acton Construction Co., Inc.,

Third-Party Defendants.

ORDER DISMISSING THIRD-PARTY COMPLAINT
AND GRANTING SUMMARY JUDGMENT

The Third-Party Defendant, Acton Construction Co., Inc., (Acton) having moved for dismissal of the Third-party Complaint against it; for a Summary Judgment in its favor; and alternatively, for separate trial; and Acton having served and filed said Motions and accompanying Affidavit and Brief as required by Rule 2.2(c) of the North Dakota Rules of Court; and the time for file of Answer Briefs having expired; said Motions are therefore deemed submitted and taken under advisement by the Court; and, pursuant to Rule 3.2(d) of the Rules of Court, failure to file a Brief by an adverse party being an admission that, in the opinion of counsel, that the motions are meri-

torious; and the Court having examined the Pleadings and other documents and records filed herein; and the Court being fully advised in the premises:

The Court finds that the Third-Party Complaint fails to show any liability of Third-Party Defendant Acton to Third-Party Plaintiff for any relief that might be granted under Plaintiff's claim for relief in the main action.

The Court finds that there is no genuine issue as to any material fact in the Third-Party action against Acton and that Acton is entitled to Judgment as a matter of law.

THEREFORE, IT IS ORDERED

1. That the Motion to Dismiss be and is granted and the Third-Party Complaint against Acton Construction Co., Inc., be and is stricken for failure to state a claim.

2. That Third-Party Defendant, Acton Construction Co., Inc.'s, Motion for Summary Judgment be, and it hereby is, granted.

3. That the Clerk of this Court enter a Judgment dismissing the Third-Party Complaint against Acton Construction Co., Inc., with prejudice, and awarding Acton its costs and disbursements against the Third-Party Plaintiff.

4. That the Motion for separate trial is denied.

DATED this 12th day of October, A. D., 1981.

/s/ Wallace D. Berning,
Judge of the District Court

Civil No. 46392

IN DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT

STATE OF NORTH DAKOTA
COUNTY OF WARD

Three Affiliated Tribes of the
Fort Berthold Reservation,

Plaintiff,

vs.

Wold Engineering, P. C., a North Dakota
Professional Corporation,

Defendant and Third-Party Plaintiff,

vs.

Schmidt, Smith and Rush,

Third-Party Defendants.

MEMORANDUM OPINION

FACTS

The Plaintiff seeks to recover from the Defendants for defective workmanship on a project within the Fort Berthold Indian Reservation. The action is based upon alleged negligence. At the commencement of trial proceedings, the Defendant, Wold Engineering, submitted a Motion to Dismiss for Lack of Jurisdiction, citing the provisions of 25 U. S. C. §§ 1322 and 1326 and 27-19-01 NDCC. It was stipulated by both parties that a tribal election was not held to ratify the proceedings in this case. The Plaintiff resists the Motion contending that it was not the intention of the Indian Civil Rights Act to apply to tribal

governments such as the Plaintiff. The Court, after considering the Motion, recessed the trial and invited briefs from parties, both which replied. The Court grants the Motion to Dismiss.

LAW

Article XIII, Section 1(2) of the North Dakota Constitution disavows jurisdiction over all Indian land, subject to certain qualifications. The provisions of 25 U. S. C. §§ 1322 and 1326 gives authority to states to assume jurisdiction *with a consent of the tribe* occupying a particular Indian country. Later such jurisdiction would be "over any or all" civil actions arising within such Indian country. Section 1322 states further that those civil laws of a state assuming jurisdiction that are of "general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within the state". Section 1326 requires a special election as a condition to state jurisdiction. The State of North Dakota in the provisions of Section 27-19-01 has extended jurisdiction "over *all* civil causes of action which arise on Indian reservations." This extension of jurisdiction again is subject to the provisions of a tribunal election. The Plaintiff contends that these provisions relate only to the rights of individuals. He cites certain parts of the federal statute relating to "private persons or private parties". The Court does not agree with that interpretation and finds that the quoted excerpts are only descriptive of a general category of laws such as which would be applicable (i. e., negligence) in this case.

The most recent consideration of this problem by the state Supreme Court has been the case of the *United States ex rel. Hall v. Hanson,* 303 N. W. 2d 349 which held that state jurisdiction over "events" occurring on reservation lands may be obtained only by state and tribal compliance with the afore-cited provisions of federal law. The Court cites its previous case of *Nelson v. Dubois,* 232 N. W. 2d 54 which stated that state jurisdiction over Indian country may be obtained only by state and tribal compliance with Sections 1322 and 1326. In neither case was there a qualification relating to tribal persons vis-a-vis tribal governments. The Plaintiff would vitiate the *Hanson* case by concluding that the decision was proper because the area of trespass on federal trusts land has been preempted by federal law. A close reading of the case does not corroborate the Plaintiff's contentions. Accordingly, I hereby grant the Defendant's Motion to Dismiss this action without prejudice to proceed further upon compliance with the appropriate statutes is effected.

Dated at Minot, North Dakota, this 11th day of January, 1982.

BY THE COURT:
/s/ Wallace D. Berning
District Judge

cc: Ct file
J Holm
H McCutcheon
J Sebby
P Kloster

District Court
Fifth Judicial District